A

TENG HOWE SING

v.

PP

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FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHERIFF PCA
ARIFIN ZAKARIA CJ (MALAYA)
ZULKEFLI MAKINUDIN FCJ
[CRIMINAL APPEAL NO: 05-63-2008 (Q)]

C

23 JANUARY 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Conviction and sentence to death - Appeal against - Misdirection - Possession of drugs - Whether knowledge*

D

proved - Conduct of accused - Inference to be drawn - Non-direction as to weight and status of evidence - Cautioned statement - Imposition of duty to disclose relevant information - Review of findings of fact

EVIDENCE: *Witness - Weight given to evidence - Non-direction as to*

E

weight and status of evidence of person arrested at same time as accused - Whether would have been relevant and favourable to accused

EVIDENCE: *Weight - Evidence of witness - Non-direction as to weight and status of evidence of person arrested at same time as accused - Whether would have been relevant and favourable to accused*

F

CRIMINAL PROCEDURE: *Statements - Cautioned statements - Duty to disclose relevant information - Imposition of - Whether failure by accused to provide relevant information entitled trial judge to disbelieve him - Finding of fact*

G

CRIMINAL PROCEDURE: *Disclosure of information - Statement of accused - Failure to provide relevant information - Whether entitled trial judge to disbelieve him - Finding of fact*

EVIDENCE: *Statement - Cautioned statement - Duty to disclose*

H

relevant information - Imposition of - Whether failure by accused to provide relevant information entitled trial judge to disbelieve him - Finding of fact

The appellant was charged with the offence of trafficking in

I

dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act'). The appellant and his college mate ('PW12') were both arrested by the police in an ambush. The appellant, upon

hearing shouts of the police, threw away a package that he had collected from a courier service company. In obtaining the package, the appellant had signed the name "Ling Hang Wei" instead of his own on a copy of the Consignment Note ('exh. P4'). The package was found to contain 371.12 grams of cannabis and the appellant was charged accordingly. The High Court convicted and sentenced him to death, and his subsequent appeal to the Court of Appeal was dismissed. In this appeal against that decision, the following grounds were advanced by the appellant: (i) the trial judge had misdirected himself as to the issue of "knowledge", the key ingredient of possession; (ii) the Court of Appeal had completely misdirected itself by way of non-direction as to the weight and status of the evidence of PW12; and (iii) the Court of Appeal erred in law in not directing its mind sufficiently on the serious misdirection by the trial judge, who had imposed on the appellant a duty to disclose relevant information, in particular regarding a person named "Ho Seng" (who allegedly requested the appellant to collect the package containing the drugs), in his cautioned statement to the police.

Held (dismissing the appeal)
Per Zulkefli Makinudin FCJ delivering the judgment of the court:

(1) The trial judge was justified in making an inference that the appellant, on the facts, had knowledge that the package contained drugs by drawing a nexus between his conduct of signing "Ling Hang Wei" instead of his name at the receiver's column in exh. P4, and his conduct in throwing the package and running away upon hearing shouts by the police. Taken together, it would appear to be too plain and obvious for the appellant not to know the nature of the things found in his possession. As such, the trial judge and the Court of Appeal were clearly right in holding that the prosecution had proved that the appellant was in possession of the drugs that he was found carrying that day. (para 21)

(2) There was nothing to show that PW12's evidence, if considered in the light of the version of the appellant's case, would have been relevant and favourable to the appellant. PW12 was called by the prosecution as a witness merely to show he was present together with the appellant at the scene of the alleged offence, and the prosecution must have been

satisfied that PW12 was not involved in the commission of the offence. Hence, the question of PW12's evidence not being challenged or his credibility impeached by the prosecution did not arise at all. PW12's evidence, on the facts, was that the appellant only mentioned "Ho Seng" as the appellant's friend but PW12 himself never met this "Ho Seng". Furthermore, there was no evidence to show that PW12 knew the real name of "Ho Seng" was Ling Hang Wei or that the appellant was collecting the package at the request of "Ho Seng". (para 26)

(3) The trial judge was correct to conclude that the appellant had two opportunities to provide information about "Ho Seng" *ie*, at the time of his arrest and five days later during the recording of his cautioned statement but he failed to do so. In the circumstances, the appellant's failure to provide relevant information about "Ho Seng" for the police to carry out a thorough investigation into the probability of his defence entitled the trial judge to disbelieve him. The trial judge had made a correct finding of fact, upon evaluation of the defence case, that he did not believe the story regarding "Ho Seng" and that it did not raise any reasonable doubt in the prosecution's case. The judges of the Court of Appeal had expressed that they had no reason to disturb that finding. These two concurrent findings of fact by the courts below need not be reviewed by this court. *PP v. Badrulsham* (foll); *PP v. Munusamy* (foll). (paras 32 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh melakukan kesalahan mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Perayu dan rakan kolejnya ('PW12') telah ditangkap oleh polis dalam suatu serang hendap. Perayu, apabila mendengar jeritan polis, membuang satu pakej yang beliau telah mengambil dari sebuah syarikat perkhidmatan kiriman cepat. Semasa mengambil pakej itu, beliau telah menandatangan nama "Ling Hang Wei" dan bukan namanya sendiri atas suatu salinan Nota Konsainan ('eks. P4'). Pakej itu didapati mengandungi 371.12 gram kanabis dan perayu telah dituduh sewajarnya. Mahkamah Tinggi telah menyabit dan mengenakan hukuman mati ke atasnya, dan rayuan seterusnya ke Mahkamah Rayuan telah ditolak. Dalam rayuan ini terhadap keputusan itu, alasan-alasan berikut telah dikemukakan oleh perayu: (i) hakim perbicaraan telah menyalarahkan dirinya mengenai

isu "pengetahuan", ingredien utama dalam milikan; (ii) Mahkamah Rayuan telah benar-benar menyalaharahkan dirinya disebabkan ketidakarahan berkenaan dengan kepentingan dan status keterangan PW12; dan (iii) Mahkamah Rayuan telah khilaf dalam undang-undang dengan tidak mempertimbangkan dengan secukupnya salah arah oleh hakim perbicaraan, yang telah mengenakan ke atas perayu kewajipan untuk mendedahkan maklumat relevan, terutamanya berkenaan dengan seorang yang bernama "Ho Seng" (yang dikatakan telah meminta perayu mengambil pakej yang mengandungi dadah itu), dalam pernyataan beramarannya kepada polis.

Diputuskan (menolak rayuan)
Oleh Zulkefli Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Hakim perbicaraan berhak membuat inferens bahawa perayu, atas fakta, mempunyai pengetahuan bahawa pakej itu mengandungi dadah dengan membuat hubungan di antara kelakuan menandatangani "Ling Hang Wei" dan bukan namanya pada ruang pemerima eks. P4, dan kelakuannya membuang pakej itu dan berlari apabila mendengar jeritan polis. Diambil bersama, ia nampak terlalu jelas dan ketara untuk perayu tidak mengetahui sifat barang yang dijumpai dalam milikannya. Oleh itu, hakim perbicaraan dan Mahkamah Rayuan jelasnya betul apabila memutuskan bahawa pendakwaan telah membuktikan bahawa perayu mempunyai milikan dadah yang dibawa oleh beliau pada hari itu.

(2) Tidak ada apa-apa untuk menunjukkan bahawa keterangan PW12, jika dipandang berdasarkan versi kes perayu, akan menjadi relevan dan berpihak kepada perayu. PW12 telah dipanggil oleh pendakwaan sebagai saksi hanya untuk menunjukkan beliau berada bersama dengan perayu di tempat kejadian kesalahan itu, dan pendakwaan mesti telah berpuas hati bahawa PW12 tidak terlibat dalam pembuatan kesalahan itu. Oleh itu, soalan mengenai keterangan atau kredibiliti PW12 tidak dicabar oleh pendakwaan tidak bangkit langsung. Keterangan PW12, di atas fakta, ialah bahawa perayu hanya telah mengatakan "Ho Seng" ialah kawan perayu tetapi PW12 sendiri tidak pernah jumpa "Ho Seng" ini. Lagipun, tiada apa-apa keterangan untuk menunjukkan bahawa PW12 tahu nama sebenar "Ho Seng" ialah Ling Hang Wei atau bahawa perayu mengambil pakej itu atas permintaan "Ho Seng".

(3) Hakim perbicaraan betul apabila memutuskan bahawa perayu mempunyai dua peluang untuk memberi maklumat mengenai "Ho Seng", iaitu, pada masa penangkapannya dan lima hari selepas itu semasa merekodkan pernyataan beramarannya tetapi beliau gagal berbuat demikian. Dalam keadaan sebegitu, kegagalan perayu untuk memberi maklumat relevan tentang "Ho Seng" bagi membolehkan polis menjalankan penyiasatan penuh dalam kebarangkalian pembelaannya memberi hak kepada hakim perbicaraan untuk tidak mempercayainya. Hakim perbicaraan telah membuat suatu dapatan fakta yang betul, berdasarkan pertimbangan kes pembelaan, bahawa beliau tidak percaya cerita mengenai "Ho Seng" dan bahawa ia tidak membangkitkan apa-apa keraguan munasabah dalam kes pendakwaan. Hakim-hakim Mahkamah Rayuan telah mengatakan bahawa mereka tidak mempunyai apa-apa sebab untuk bercampurtangan dengan dapatan itu. Kedua-dua dapatan fakta bersama oleh mahkamah bawahan tidak itu tidak perlu dikaji semula oleh mahkamah ini. *PP v. Badrulsham* (diikuti); *PP v. Munusamy* (diikuti).

Case(s) referred to:
Abdullah Zawawi Yusof v. PP [1993] 4 CLJ 1 SC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
DPP v. Brooks [1974] 2 All ER 840 ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Badrulsham Baharom [1988] 2 MLJ 585 ***(foll)***
PP v. Munusamy [1980] 1 LNS 63 ***(foll)***
Tan Ah Tee & Anor v. PP [1978] 1 LNS 193 ***(refd)***
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

For the appellant - Orlando SW Chua; M/s Wong, Orlando Chua & Kuok
For the respondent - Puan Mangai DPP

[Appeal from Court of Appeal; Criminal Appeal No: Q-05-77-2003]

[Editor's note: For the Court of Appeal judgment, please see Teng Howe Sing v. PP [2008] 5 CLJ 186.]

Reported by Suresh Nathan

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] The appellant was charged for an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA) in the High Court at Sibu as follows:

> That you, on 17 March 1999 at about 7.50 p.m., in front of WWW Chat Café, Jalan Kai Peng, Jalan Tuanku Osman, Sibu in the State of Sarawak, on your own behalf did traffic in a dangerous drug, to wit, 371.12 grammes of Cannabis, and you thereby committed an offence under section 39B(1)(a) of the Dangerous Drugs Act, 1952 (Revised 1980) punishable under section 39B(2)(a) of the same Act.

[2] At the end of the trial, the appellant was convicted and sentenced to death by the High Court. Being dissatisfied with the said decision, the appellant appealed to the Court of Appeal. The Court of Appeal affirmed the conviction and sentence imposed by the High Court. It is against this decision of the Court of Appeal which the appellant is now appealing to this court.

Background Facts

[3] The relevant background facts of the case are as follows:

[4] On 17 March 1999, at about 6pm, PW2 led a team of five policemen consisting of PW3, PW4, PW7, Sgt. Faizal Abdullah and L/Cpl. Tambahan Geraji to lay an ambush on a person suspected of trafficking in dangerous drugs. PW2 positioned his men at strategic places near two business premises, namely, a coffee shop named WWW Chat Café and a courier services company called Skynet Worldwide Courier Services ("Skynet") situated on the second floor of the block of shops at Jalan Kai Peng and Jalan Tuanku Osman, Sibu. At about 7.50pm, PW2 saw the appellant and PW12 coming down the staircase that led to the offices of Skynet. Both the appellant and PW12 were later seen walking towards a motorcycle parked in front of the WWW Chat Café. PW2 saw that the appellant was carrying a package in his right hand. As the appellant and PW12 approached the motorcycle, PW2 and his men sprang into action with PW2 shouting "Polis, jangan lari", whereupon the two men tried to run away with the appellant throwing away the package he was

carrying. It fell next to the motorcycle. A scuffle then took place after which the appellant and PW12 were arrested. After the appellant and PW12 were arrested, PW2 picked up the package thrown away by the appellant and found it to be a plastic package bearing the logo "Skynet Worldwide Express". In it PW2 found an envelope. It was addressed to "Jeffrey Wong Sibu 016-8666577". Written on the reverse side of the envelope were the words "From: Ah Mui No. 38, Jalan SS5/12, P.J. Sel. No. 0198871268." In the envelope PW2 found a package wrapped in Chinese newspaper and on unwrapping the newspaper, he found a plastic container. On opening the container, PW2 found another package wrapped in Chinese newspaper bound in cellotape. On opening the package, PW2 found two blocks of compressed dried leaves. One block was larger than the other. PW2 then brought the appellant, PW12 and the exhibits he had seized at the scene, back to the Central Police Station Sibu where all exhibits were marked by him. At the police station, the appellant was again searched and from him three other items were seized:

(a) a Skynet Consignment Note (exh. P4);

(b) a wallet; and

(c) a handphone.

[5] Upon analysis PW1 (the chemist) confirmed that the two compressed slabs contained a net weight of 371.12 grammes of cannabis.

Findings Of The High Court

[6] The learned High Court Judge found that there was sufficient evidence before the court to prove that the accused was in physical possession of the package in which the drugs were found. This evidence was provided by the testimony of Abd. Rahman Mohd. Sharif (PW11) the manager of Skynet, Sibu, who handed the package to the accused on the evening of 17 March 1999 and obtained his signature in acknowledgment on a copy of the Consignment Note (exh. P4). The evidence showed that after claiming the package from Abdul Rahman and until the time of his arrest, the package was in the physical possession of the accused at all times. That evidence was provided by the testimony of the police officers in the ambush team, namely PW2, PW3, PW4 and PW7 who all gave evidence to the effect that the accused was seen coming down from the staircase leading to the Skynet offices

and thereafter proceeding towards a motorcycle carrying a package which he threw away upon being ambushed by the police team. As the chemist, PW1's evidence showed that the total combined weight of the cannabis in "A6" and "A7" weighed 371.12 grammes, the learned High Court Judge found the presumption under s. 37(da) of the DDA had been successfully invoked by the prosecution and the accused was to be presumed to be trafficking in the said drug. The accused was accordingly called to enter upon his defence.

[7] At the close of the trial, the learned trial judge after weighing the appellant's evidence against the prosecution's evidence, came to the conclusion that the appellant had failed to raise any reasonable doubt on the prosecution's case that he was in possession of the drugs that he was carrying at the time of his arrest and had failed to rebut the presumption of trafficking raised against him.

Findings Of The Court Of Appeal

[8] The Court of Appeal in affirming the decision of the High Court in its judgment *inter alia* stated as follows:

> We are satisfied that the learned trial Judge has considered fully all the evidence given on behalf of the defence and having weighed it against the prosecution's case he has come to the correct conclusion that the accused has not raised any reasonable doubt to show that the accused was not in actual possession of the package at the material time and that he did not know that the package contained drugs. As the weight of the proscribed drugs in the possession of the accused exceeded two hundred grammes of cannabis, section 37(da)(vi) of Dangerous Drugs Act 1952 triggered the presumption of trafficking in the said drugs against the accused. The learned trial Judge has correctly concluded, that on the evidence before him, the accused has failed to rebut the statutory presumption of trafficking.
>
> (See p. 14 vol. 1 of the appeal record).

The Appeal

[9] Learned counsel for the appellant in his argument before us had advanced a number of grounds of appeal. However, we shall deal only with the relevant grounds which were focused on the following issues:

[10] It was submitted before us that the Court of Appeal erred in law failing to give sufficient judicial appreciation to the issue of the purported use of fictitious name by the appellant in the given circumstances of the case. It is the contention of the appellant that the learned trial judge had misdirected himself as to the issue of "knowledge" which is the key ingredient of possession. Learned counsel for the appellant drew our attention to that part of the judgment of the trial judge on this issue as follows:

> Reverting to the facts of our case, the conduct of the accused in trying to run away and throwing away the package he was carrying on hearing the words 'Polis, jangan lari' being shouted at him, coupled with the fact that when he collected the package only a few minutes earlier from the offices of Skynet he had used the name of 'Ling Hang Wei' instead of his own name, clearly established a nexus between his conduct, his flight and the offence in question. By using a name other than his own when collecting the package and later by throwing it away when ambushed, the accused had taken steps to conceal his true identity and dissociate himself with what constitute the offence. There was, therefore, clear and compelling evidence from which it can be reasonably inferred that the accused had knowledge of the incriminating nature of the contents of the package, ie, that it contained drugs.
>
> (See pp. 5-6 vol. 1 of the appeal record)

[11] It was submitted by learned counsel for the appellant that based on the above finding the learned trial judge had already nailed the issue of knowledge on the fact that the appellant had deliberately used a "fictitious" name, "Ling Hang Wei" instead of his own name so as to dissociate himself from the incriminating item should he be caught eventually. According to the learned trial judge, the appellant's alleged attempt to flee, his alleged throwing away of the incriminating package culminating in his conscious intent to dissociate himself by the use of a fictitious name clearly established a nexus between his conduct, his flight and the offence in question. The appellant, however, had contended that "Ling Hang Wei" was in fact the actual name of a friend of his, going by the nickname "Ho Seng" who had asked him to collect something from the courier service office.

[12] It was also submitted for the appellant that on the envelope of the Consignment Note (exh. P4) there was already a name "Jeffrey Wong" written on it as the intended addressee. To the appellant, it would be more sensible for the appellant to simply sign

as the intended addressee "Jeffrey Wong" in the acknowledgment receipt to ensure a smoother transmission of the said package and to avoid any suspicion if indeed he had the necessary *mens rea*. By so doing he would equally achieve the same objective.

[13] Still on the same issue it was argued for the appellant that the learned trial judge had wrongly assumed that the appellant had deliberately used a fictitious name when there is simply no evidence to support that finding. Learned counsel for the appellant referred to us that part of the testimony of PW11 Abdul Rahman bin Mohd Sharif, the then branch manager of Skynet to prove his point as follows:

> The accused signed and wrote his name and date and time on the consignee's copy of the consignment note in my presence. I saw him do it. The name written down by the accused on the consignee's copy was Ling Hang Wei. The consignment note which the accused signed is addressed to Mr. Jeffrey Wong. There is a telephone contact number for Mr. Jeffrey Wong given in the consignment note. The phone number is 016-8666577.
>
> (See p 155 vol. 2 of the appeal record)

[14] Based on the above learned counsel for the appellant submitted that at no time was the appellant asked by PW11 or anyone for that matter, to sign the acknowledgement or to write down his real name on the consignee's copy of the consignment note. To the appellant the learned trial judge's finding might be justified if the appellant was asked specifically by PW11 to acknowledge receipt by signing or writing down his real name and he had deliberately chosen to use a name other than his own. That might point to *mens rea*. Further, it was argued that it was not in evidence that PW11 had made known to the appellant that it was a mandatory requirement for the appellant to disclose his real name when collecting the said package.

[15] For all the reasons given above the appellant contended that the learned trial judge had seriously misdirected himself by omitting to address his mind to this glaring issue. The learned trial judge had therefore not viewed the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was then fairly open to him to exonerate himself.

[16] With respect we find that the above argument and reasonings made on behalf of the appellant on the issue of purported use of a fictitious name by the appellant untenable in

A the circumstances of the case. In our view the crux of the case against the appellant is centred on the issue of possession. We find on the evidence adduced by the prosecution, the High Court and the Court of Appeal were correct in coming to the conclusion that the appellant was in actual possession of the said drugs
B independent of s. 37(d) of the DDA.

[17] PW11 testified that he handed over the package P3B to the appellant at about 7.50pm in the Skynet office upon the appellant presenting a piece of paper containing numbers that matched the
C consignment note numbers of P3B. PW11 further testified that he told the appellant to append his signature on the consignment note and that the appellant did sign and write his name, date and time in P4 in his presence. It was the evidence of PW2 that he and his men were waiting at strategic places around the WWW
D Chat Café and Skynet for about two hours, when he saw the appellant and PW12 coming down the staircase (that led to the offices of Skynet). PW2 saw the appellant carrying a package. The appellant and PW12 were seen walking towards a motorcycle. Then PW2 and his men rushed towards them with PW2 shouting
E "Polis, jangan lari". Upon hearing that, the appellant and PW12 tried to run away, with the appellant throwing away the package that he was carrying and it fell next to the motorcycle. A scuffle took place and thereafter the appellant and PW12 were arrested. PW2 picked up the package thrown away by the appellant and
F found it to contain the drugs (P3K and P3L).

[18] We therefore find that there was more than sufficient evidence for this court to conclude that the appellant was in possession of the drugs that he was carrying. In *Chan Pean Leon v. PP* [1956] 1 LNS 17, Thompson J dealt with the issue of
G possession under the Common Gaming Houses Ordinance 1953 and he observed:

> Possession itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed) page 304:
>
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> A movable thing is said to be in the possession of a person when he is so situated with respect to it that *he has the power to deal with it as owner to the exclusion of all other persons,* and when the circumstances are such that he may be presumed to intend to do so in case of need.

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> To put it otherwise, there is a physical element and mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. *It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi.* Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances … *There must be some evidence that I am doing or having done something with it that shows such an intention. Or it must be clear that the circumstances in which it is found show such an intention … But there must be something in the evidence to satisfy the court that the person who is physically in a position to deal with the thing as his own had the intention of doing so …* (emphasis added)

[19] In our instant case it is to be noted when PW2 shouted "Polis, jangan lari", the first thing that the appellant did was to throw away the package that he was carrying and ran away. Obviously that conduct showed that the appellant had exercised his power to deal with the package P3B as if he was the owner. Otherwise he would not have thrown it away. In the Federal Court case of *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, the Court referred to a Singapore case of *Tan Ah Tee & Anor. v. PP* [1978] 1 LNS 193 on the issue of possession and held at p. 351 as follows:

> Even if there were no statutory presumptions available to the prosecution, *once the prosecution had proved the fact of physical control or possession of the plastic bag* and the circumstances in which this was acquired by and remained with the second appellant, the trial Judges would be justified in finding that *she had possession of the contents of the plastic bag within the meaning of the Act unless she gave an explanation of the physical fact which the trial Judges accepted or which raised a doubt in the minds that she had possession of the contents within the meaning of the Act.* (emphasis added)

[20] Still on the issue of knowledge to establish possession we would refer to the words of Lord Wilberforce in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 at p. 394 where his Lordship held that:

> In all such cases, *the starting point will be that the accused had physical control of something – a package, a bottle, a container – found to contain the substance. This is evidence – generally strong evidence of possession. It calls for an explanation.* The explanation will be heard

A and the jury must decide whether there is genuine ignorance of the presence of the substance, or such an acceptance of the package with all that it might contain, or with such opportunity to ascertain what it did contain or such guilty knowledge with regard to it as to make up the statutory possession. (emphasis added)

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[21] In the present case we are of the view the learned trial judge is justified in making an inference that the appellant had knowledge that the package P3B contained drugs by drawing a nexus between his conduct of signing "Ling Hang Wei" instead of C his name at the receiver's column in P4, and his flight and the act of throwing away the package upon hearing the shouts of "Polis, jangan lari". Taken together all the facts mentioned above, it would appear to be too plain and obvious for the appellant not to know the nature of the things found in his possession. As such D we are of the considered view that the learned trial judge and the Court of Appeal were clearly right in holding that the prosecution had proved that the appellant was in possession of the drugs that he was found carrying on that day.

E **[22]** We also would take the view that the appellant's conduct in throwing the package and running away upon hearing shouts by the police points to the evidence of knowledge on the part of the appellant as to the contents of the package that he was carrying on that day. In the case of *Abdullah Zawawi Yusoff v. PP* F [1993] 4 CLJ 1, this court came to the conclusion that the accused's conduct in taking to his heels upon the police announcing the discovery of the drugs in the box was equivocal because the conduct of the accused was equally consistent with the accused having been in a state of pure panic, bearing in mind G that it was only after the police announced the discovery of the drug that the accused took to his heels. This court therein said this was distinguishable from the facts of the case in *DPP v. Brooks* [1974] 2 All ER 840, where the accused, who occupied the driver's seat of a stationary van which contained more than one H thousand pounds of ganja, together with several others in the van, scrambled out and ran off, when the police officers hurried towards the van even before the discovery of the drugs. However, this court in the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 had discussed the applicability of evidence of conduct to infer I knowledge as discussed in *Abdullah Zawawi*'s case and *Brooks*' case and held at p. 748 as follows:

> The difference in both the cases is that in *Abdullah Zawawi bin Yusoff v. PP* [1993] 3 MLJ 1 there was no evidence to show that the act of the accused in running away was influenced by any fact in issue or relevant fact within the meaning of section 8 in view of the possibility of access to the house by others. It is therefore not admissible on this ground as it is equivocal thereby justifying an inference in favour of the accused being drawn and ought to have been so ruled at an earlier stage of the trial. The case of *Abdullah Zawawi bin Yusoff v. PP (supra)* is therefore authority only to this extent. On the other hand in *DPP v. Brooks* [1974] 2 All ER 840 *there was evidence to show that the drugs were in the physical custody and control of the accused and his conduct of running away thus comes, in the Malaysian context, within the meaning of section 8. It is therefore admissible and cannot be explained away by the Court itself by offering an explanation which is consistent with the innocence of the accused. The explanation must be offered by the accused himself as required by section 9.* (emphasis added)

[23] In the present case it is to be noted that the appellant upon being approached by the police even before his arrest and before the discovery of the drugs had attempted to escape by running away and throwing away the package P3B that he was carrying in his right hand. Therefore we are of the view that it is correct to infer from the appellant's conduct that he had knowledge of the contents of the package P3B until he gives a plausible explanation. As a matter of fact in this case the learned trial judge did not accept the appellant's explanation that he released the package P3B upon hearing the police shouting "Polis, jangan lari" because he thought that the thing he was carrying might be smuggled goods or obscene tapes, simply because there was no evidence to support such an explanation.

[24] Learned counsel for the appellant had also argued that the Court of Appeal had completely misdirected itself by way of nondirection as to the weight and status of the evidence of PW12, Moh Yong Ming who was called by the prosecution. The appellant contended that the evidence of PW12 was relevant and favourable to the appellant and PW12's evidence was never challenged nor impeached by the prosecution. In this case PW12 was the college mate of the appellant who was arrested at the same time as the appellant. PW12 had upon the police's ambush also been seen to be struggling and trying to flee. PW12 in his examination-in-chief had stated *inter alia* as follows:

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> When we had almost finished our drink, Teng Howe Sing informed me that his friend had asked him to collect something and he asked me to wait at the coffee-shop.

(See p. 159 vol. 2 of the appeal record)

B **[25]** It is the appellant's contention that PW12's testimony as aforesaid is most relevant as it goes to show the intention and state of mind of the appellant at the material time. The appellant could have chosen not to tell PW12 anything but stealthily gone off to collect the incriminating package if indeed the appellant had
C a guilty mind. The appellant could also have gone there all on his own without the company of PW12, to carry out that alleged act.

[26] We also find that the above contention of the appellant is untenable in the circumstances of the case. From the evidence
D adduced through PW12 there is nothing to show that PW12's evidence if considered in the light of the version of the appellant's case would have been relevant and favourable to the appellant. PW12 was called by the prosecution as a witness merely to show he was present together with the appellant at the scene of the
E alleged offence and the prosecution must have been satisfied that PW12 was not involved in the commission of the offence. Hence the question of PW12's evidence not being challenged or his credit impeached by the prosecution does not arise at all. It is to be noted in this case that PW12's evidence was that the appellant
F only mentioned "Ho Seng" as the appellant's friend but PW12 himself have never met this "Ho Seng". Furthermore, there is no evidence to show that PW12 knew "Hong Seng"'s real name was Ling Hang Wei or that the appellant was collecting the package P3B at the request of "Hong Seng".

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[27] Learned counsel for the appellant had also argued that the Court of Appeal erred in law in not directing its mind sufficiently on the serious misdirection by the learned trial Judge who had imposed on the appellant a duty to speak/disclose relevant
H information in particular regarding the person named "Ho Seng" in his cautioned statement to the police. In this case the Court of Appeal had made the following observation with regard to the finding of the learned trial judge on this issue as follows:

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> However, the learned trial Judge did not believe the story of the accused regarding 'Ho Seng'. We have no reason to disturb that finding. This is what he said in his grounds of judgment:

For the reasons that follow I do not believe the story of the accused regarding 'Ho Seng'. Since it is the accused's case that he had done all what he did at the request of 'Ho Seng' it is logical and reasonable to expect that after his arrest, he would at the earliest opportunity provide all relevant information regarding 'Ho Seng' to the police. The accused did have that opportunity when he gave his cautioned statement to the police. In it he revealed the name 'Ho Seng' and that he had spoken to 'Ho Seng' at least three times on 17 March 1999 but he never gave any further information about 'Ho Seng', such as his phone number or any place or places where he could be found at or contacted. In his testimony the accused said that 'Ho Seng"s telephone number was 016-8666577 but he did not mention this in his cautioned statement. Most importantly, the accused did not reveal that when he referred to 'Ho Seng', he was referring to a person by his nickname, and that 'Ho Seng"s real name was Ling Hang Wei. Since the accused had set out to make a exculpatory cautioned statement by saying that it was 'Ho Seng' who had asked him to collect the package, it is only reasonable to expect that if what he said was true, he would also go on to reveal everything he knew about 'Ho Seng' in his statement. But he did not do so. The Investigation Officer Inspector Alekzandra (PW14) testified that he interrogated the accused on three occasions, namely, on 18 March 1999 after the accused was remanded in custody, on 19 March 1999 when the accused was brought out of the lock-up to have his finger prints taken, and on 22 March 1999 after the accused had given his cautioned statement to Inspector Lee, but the accused had not revealed the information I have referred to. Although the accused did say that a policeman Corporal Charles Tuoh (now deceased) came to see him in the lock-up after his arrest and in response to a request from Charles Tuoh he had tried, without result, to telephone 'Ho Seng' there is no evidence that the accused gave any further information to Charles Tuoh about 'Ho Seng' than what was revealed by him in his cautioned statement.

In my judgment the quality, extent and result of any police investigation into 'Ho Seng' depended very much on proper information or leads being provided to the police by the accused himself. Since the accused was referring to 'Ho Seng' by nickname only it was crucial that he make the police aware of this fact, and since it was the accused who knew the real name of 'Ho Seng' it was imperative that he informed the police about this too, but he did not. Likewise, it would be the accused himself, who would know who his circle of friends were and who amongst them knew 'Ho Seng', whether by his nickname or real name. It

A was therefore imperative that the accused furnished this information to the police for their investigation purposes but without his having done so there is no basis for his complaint about the police investigations.

(See pp. 11-14 vol. 1 of the appeal record)

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[28] After having quoted the learned trial judge *in extenso* the Court of Appeal went on to agree with His Lordship and said:

We are satisfied that the learned trial Judge has considered fully all the evidence on behalf of the defence and having fully weighed it against the prosecution's case he has come to the correct conclusion that the accused has not raised any reasonable doubt to show that the accused was not in actual possession of the package at the material time and that he did not know that the package contained drugs.

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[29] It is the contention of the appellant that the above findings clearly demonstrated that both the learned trial judge and the Court of Appeal have erred in that there has been a serious misdirection *viz.* the imposition upon the appellant a duty to speak which the law does not impose. Such a misdirection as contended by the appellant constitutes a serious misdirection as obviously an adverse inference would have been drawn against the appellant.

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[30] With regard to the above contention of the appellant it is our judgment that it is misconceived. By commenting on the failure of the appellant to provide all relevant information regarding "Ho Seng" to the police at the time of his arrest or when his cautioned statement (D2) was recorded five days after his arrest does not mean that the learned trial judge had imposed on the appellant a duty to speak/disclose them in his cautioned statement nor did he draw any adverse inference against the appellant. The learned trial judge's comments on the late disclosure of the real identity of "Ho Seng" at the defence stage merely goes to show the weight that the court attached to the appellant's defence which is permitted by the law. On this point we would like to refer to the case of *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585, wherein Lim Beng Choon J at p. 591 said that:

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… So we are left with nothing more than the bare oral assertion of the accused that it was Noor Azlan who asked him to collect the bag on behalf of the former and that the accused himself had no knowledge of the contents of P3. If that be the case, one

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> would hardly imagine that he would not have told either PW3 or PW5 at the railway station at Alor Setar at the time of his arrest that P3 belonged to Noor Azlan instead of saying that there was nothing in P3.

[31] In *Badrulsham*'s case, the court was of the view that the failure of the accused to inform the raiding officers that the white plastic bag belonged to Noor Azlan at the time of his arrest and only revealing this information during the interrogation two hours after his arrest, goes some way to support the case for the prosecution.

[32] Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial Judge was correct to conclude that the appellant had two opportunities to provide information about "Ho Seng", ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about "Ho Seng" for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to disbelieve him.

Conclusion

[33] We are of the view the learned trial judge had made a correct finding of fact upon evaluation of the defence case that he did not believe the story regarding "Ho Seng" and that it does not raise any reasonable doubt in the prosecution's case. The Court of Appeal Judges had expressed their view that they have no reason to disturb that finding. On these two concurrent findings of fact by the courts below we would refer to the Federal Court's case of *PP v. Munusamy* [1980] 1 LNS 63 wherein the Federal Court had this to say:

> … Where there have been concurrent findings of fact in the lower courts it should not be made a practice in the appeal court to review these concurrent findings of fact unless it is shown that there was no evidence to support the inferences drawn in the lower courts …

[34] For the reasons stated we would dismiss the appellant's appeal and affirm the conviction and sentence passed by the learned trial judge.